SUPREME COURT, U. S.

FILED

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IN THE

Supreme Court of the United States

October Term, 1968.

No. 948

MARTIN VON CARSTANJEN,

Petitioner,

v.

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

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MARTIN VON CARSTANJEN,

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v.

THE UNITED STATES,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

ROBERT C. LEA, JR., on behalf of petitioner, prays that a writ of certiorari issue to review the order of the United States Court of Claims entered in the above action on June 14, 1968.

OPINION BELOW.

There was no opinion rendered by the Court of Claims.

JURISDICTION.

The order of the Court of Claims was made and entered on June 14, 1968, and a copy thereof is appended to this petition in the Appendix at pp. 11-12. The motion of petitioner for a rehearing was denied by the Court of Claims on October 18, 1968, and a copy thereof is also appended to this petition in the Appendix at pp. 13-14. The jurisdiction of this Court in invoked under 28 U. S. C. A. § 1255(1).

QUESTION PRESENTED.

Whether the Court of Claims in denying petitioner's motion pursuant to Rule 69 of the Court of Claims Rules so departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision under Rule 19 of the Supreme Court Rules.

RULES INVOLVED.

Rules 68 and 69 of the Rules of the Court of Claims of the United States (U. S. Ct. Cl. Rules 68 and 69, 28 U. S. C. A.) and Rule 19 of the Supreme Court of the United States Revised Rules (U. S. Sup. Ct. Rule 19, 28 U. S. C. A.) are in pertinent part set forth in the Appendix at pp. 15-16.

STATEMENT.

Petitioner, then a German national resident in Germany, caused this action to be filed in the Court of Claims by the late Saul G. Lichtenberg, Esquire, as attorney of record, and Frank Paley, Esquire, as counsel, on December 29, 1952. Respondent filed a timely answer on June 15, 1953, after two extensions of time.

Petitioner's petition to the Court of Claims involves respondent's acquisition of certain real property owned by petitioner in Germany, and alleges that respondent, through its agents, by fraud, deceit and misrepresentations, and by threats of appropriation of petitioner's property, caused petitioner to enter into a contract which is the subject matter of the action; which allegedly resulted in a loss to petitioner of the equivalent of approximately $250,000 in German currency. The jurisdiction of the Court of Claims was predicated upon 28 U. S. C. § 250(1) (now 28 U. S. C. A. §§ 1491(4)).

Subsequent to the joinder of issue in this action, petitioner's relations with Mr. Paley, whom he had engaged to represent him, deteriorated and finally terminated. On May 28, 1956, the Honorable H. Ney Evans, Commissioner of the Court of Claims, filed a motion for change of petitioner's attorneys, Messrs. Lichtenberg and Paley, which was allowed by substituting petitioner as counsel *pro se* on June 8, 1956. Some months thereafter Mr. Lichtenberg died and Mr. Paley subsequently was disbarred. Although petitioner had paid Mr. Paley a substantial retainer and was without sufficient funds to engage substitute counsel, he made every possible effort to retain substitute counsel and to proceed *pro se,* albeit frustrated in every respect by his lack of fluency in the English language, his inability to

understand the principles of law and rules of court involved and his lack of sufficient funds.

Shortly after petitioner's substitution as counsel *pro se,* Commissioner Evans by letter dated June 26, 1956 set this action for trial in Bonn, Germany on September 4, 1956, and gave notice of taking testimony there. Previously, Commissioner Evans had offered to take petitioner's testimony on June 25, 1956 in Seattle, Washington (where petitioner resided) and petitioner had accepted that offer. Petitioner did not appear at the hearing in Germany. Petitioner had tax and other trouble with the Government of the Federal Republic of Germany, making it impossible for him to return to Germany after May 31, 1956. As of April, 1965 petitioner still had no passport, was unclear as to his nationality status and did not know whether he could secure a passport. Thus, whatever petitioner had to do under the premises had to be done within the United States.

Upon Commissioner Evans' recommendation on September 21, 1956, the Court of Claims issued a show cause order returnable (after an extension of time) on December 3, 1956. Petitioner did not appear on the return date but did *pro se* forward for submission to the Court a responsive pleading showing cause why his action should not have been dismissed. This pleading was mailed on November 30, 1956 in Seattle, Washington, and according to the Court it was received in court at 10:30 A. M. on December 3, 1956, after the Court of Claims rendered the judgment for lack of prosecution.

Beginning December 27, 1956, petitioner filed *pro se* a series of motions, variously denominated, each of which was denied by the Court of Claims. The basic purpose of each was to attempt to vacate the judgment entered on December 3, 1956. The last of this series was denied on March 18, 1966. Petitioner's latest motion was filed by his

present counsel as attorney of record and brought to the attention of the Court of Claims for the first time certain crucial facts concerning the prosecution of the action and entry of the judgment. This motion to vacate the judgment pursuant to Rule 69 of the Court of Claims Rules was denied on June 14, 1968 by the Court. Petitioner by his present counsel, then, timely filed a motion for rehearing pursuant to Rule 68 of the Court of Claims Rules, which was denied by the Court on October 18, 1968.

Petitioner by his present counsel also filed in the Court of Claims a motion for oral argument on his motion to vacate the judgment in an effort to present a more concise and full discussion of the facts and arguments *pro* and *con* and, further, to give the Court an opportunity to clarify any questions it might have. This motion was also denied by the Court on June 14, 1968. As a result of respondent's response contra to petitioner's motion to vacate the judgment, and, in particular, certain misstatements of fact and new matter raised therein, petitioner also moved the Court of Claims for leave to file a response to respondent's response contra in an attempt to correct the misstatements of fact and to reply to the new matter thereof. This motion was filed in the Court on June 4, 1968 and denied by order of the Court on June 5, 1968, which order stated as the reason for denial receipt after the Court's action on petitioner's motion to vacate the judgment. The latter motion was denied by order of the Court dated June 14, 1968.

REASONS FOR GRANTING THE WRIT.

The order of the Court of Claims denying petitioner's motion to vacate the judgment pursuant to Rule 69 of the Court of Claims Rules, and, in addition, petitioner's motion for rehearing pursuant to Rule 68 of the Court of Claims Rules, so depart from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Rule 19 of the Supreme Court Rules (which are promulgated by this Court) reserves such power to this Court and only this Court, and this Court has said it shall exercise this power of supervision of the Court of Claims if in its sound judicial discretion there is a "special and important" reason therefor.

Petitioner contends that the Court should exercise its power of supervision and, thus, review on writ of certiorari to the Court of Claims the recent action taken by that Court for the following "special and important" reasons:

1. Certain crucial facts concerning the prosecution of this action and the entry of the judgment, including, but not limited to the following, were not properly considered:

> a. Petitioner's understanding of May, 1956 with Commissioner Evans as to the taking of petitioner's testimony on June 25, 1956 in Seattle, Washington.
>
> b. The fact that the notice of taking testimony pertained to certain individuals other than petitioner and further recited that respondent ". . . reserve[ ] the right to take testimony of . . . [said] . . . individuals whether or not plaintiff introduce[d] any evidence at the hearing [in Germany] . . .".
>
> c. Petitioner's responsive pleading showing cause why the action should not have been dismissed, which pleading was mailed on November 30, 1956 in Seattle, Washington and received by the Clerk of the Court of

> Claims allegedly at 10:30 A. M. on December 3, 1956, unbelievably, only a few minutes after the Court rendered the judgment for lack of prosecution; which even to date has not been docketed as part of the record.

Although these facts are set forth in petitioner's motion to vacate the judgment, the cursory action by the Court of Claims clearly establishes that the Court did not properly consider them in light of the other known facts (especially, the fact that it was impossible for petitioner to attend the hearing in Germany). Otherwise, it would have granted the motion. These facts disclose a sincere effort on petitioner's part to prosecute the action. They also disclose certain understandings with the Court of Claims and action on petitioner's part which casts suspicion on the fairness of the action taken by the Court in respect to its proceedings prior to entering the judgment and, further, in respect to the entry of the judgment itself. Under the circumstances, the Court must have completely disregarded the fact that these facts had never been presented before, there special importance to petitioner's long standing fight for relief from the judgment, and the gross inequity of a denial of petitioner's motion to vacate the judgment at a time when (for the first time) all of the facts were before it. It must follow that the Court's action so departed from the accepted and usual course of judicial proceedings as to call for review by this Court.

2. The fact that petitioner lacked fluency in the English language, was unable to understand the principles of law and rules of court or to obtain substitute counsel and was proceeding *pro se*, and their bearing on the outcome of his efforts in the Court of Claims. No one questions the inept-

ness of petitioner's efforts to prosecute the action *pro se.* It is apparent, however, that the Court has held the petitioner up to too high a standard of proficiency under the circumstances. As a consequence, the Court summarily denied petitioner's recent motions merely because of the series of like motions filed *pro se* theretofore. Thus, the age of petitioner's post judgment proceedings has hurt him, even though new and crucial facts were presented which if raised earlier undoubtedly would have caused the Court to act favorably. This factor also raises serious question as to the Court's recent action and as to whether the Court conducted a full and fair review, such as would be conducted in the accepted and usual course of judicial proceedings.

3. This action involves a serious accusation against respondent and a substantial loss to petitioner, both of which are of such special importance that they should be decided on their merits. This action has never been tried. Petitioner has never been able to present his evidence and respondent has not had the opportunity to controvert same. The nature of the action itself when coupled with the *now* apparent circumstances surrounding the prosecution of the action and the entry of the judgment would have warranted greater leniency on the part of the Court in any other case. The Court's recent action is prejudicial and most severe. If equity is to prevail, it must follow that the Court of Claims so departed from the accepted and usual course of judicial proceedings as to call for review by this Court.

CONCLUSION.

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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APPENDIX A.

IN THE

United States Court of Claims.

622-52 MARTIN VON CARSTANJEN

277-63 WEST VIRGINIA NORTHERN RAILROAD COMPANY

350-63 THEODORE MORSE AND CLAIRE MORSE

248-65 JOHN P. KING

332-66 ROBERT JAYSON, ET AL.

251-67 JAMES L. HAMLIN

406-67 LAWRENCE ELLIS MYERS

v.

THE UNITED STATES

Before COWEN, *Chief Judge,* LARAMORE' DURFEE, DAVIS, COLLINS, SKELTON and NICHOLS, *Judges,* except that Judge DAVIS took no part in the consideration and decision of No. 622-52.

ORDER.

These cases come before the court on motions to vacate or set aside judgments, for oral argument, for reconsidera-

tion, to alter judgment, for rehearing, and for further relief under Rules 68 and 69 of the rules of this court and, on consideration thereof,

IT IS ORDERED this 14th day of June, 1968, that said motions be and the same are denied as follows:

622-52 Martin von Carstanjen. Plaintiff's motion to vacate judgment entered for failure to prosecute and plaintiff's motion for oral argument.

277-63 West Virginia Northern Railroad Company. Plaintiff's motion for reconsideration and to alter judgment.

350-63 Theodore Morse and Claire Morse. Defendant's motion for reconsideration.

248-65 John P. King. Defendant's motion for reconsideration.

332-66 Robert Jayson, et al. Plaintiffs' motion to set aside summary judgment under Rule 69(b).

251-67 James L. Hamlin. Defendant's motion for reconsideration.

406-67 Lawrence Ellis Myers. Plantiff's motion for rehearing and altered or amended order.

By THE COURT
WILSON COWEN
Chief Judge

IN THE

United States Court of Claims.

622-52 MARTIN VON CARSTANJEN

139-58 IRVING A. KANAREK

186-61 LULA A. McGLASSON

348-64 NAGER ELECTRIC CO., INC AND KEYSTONE ENGINEERING CORPORATION

375-66 EDWARD J. McKENZIE, JR.

8-68 HARRY H. DRILL

v.

THE UNITED STATES

Before COWEN, Chief Judge, LARAMORE, DURFEE, DAVIS, COLLINS, SKELTON and NICHOLS, Judges, except that Judge Davis took no part in the consideration and decision of No. 622-52 and Judge Collins took no part in the consideration and decision of No. 186-61.

ORDER.

These cases come before the court on motions for rehearing, new trial, reconsideration, to alter the judgment of the court and for further relief under Rules 68 and 69 of the rules of this court and, on consideration thereof,

IT IS ORDERED this 18th day of October 1968, that said motions be and the same are denied as follows:

622-52 Martin von Carstanjen. Plaintiff's motion for rehearing.

139-58 Irving A. Kanarek. Plaintiff's motion for rehearing and/or new trial.

186-61 Lula A. McGlasson. Plaintiff's motion for reconsideration under Rule 68.

348-64 Nager Electric Co., Inc. and Keystone Engineering Corporation. Defendant's motion for rehearing and reconsideration.

375-66 Edward J. McKenzie, Jr. Plaintiff's motion for a rehearing to alter the judgment of the court and/or for a new trial.

8-68 Harry H. Drill. Plaintiff's motion and proposed "Just Terms" for relief of plaintiff from the order, and/or judgment, and/or "Proceeling" of the court entered on June 7, 1968, dismissing Case No. 8-68.

By THE COURT,

DON N. LARAMORE,
Acting for the
Chief Judge.

APPENDIX B.

RULE 68 OF THE RULES OF THE COURT OF CLAIMS OF THE UNITED STATES (U. S. CT. CL. RULE 68, 28 U. S. C. A.)

(a) GROUNDS: (1) A rehearing may be granted, a judgment may be altered or amended, or a new trial may be granted on any ground established by the rules of common law or equity applicable as between private parties....

RULE 69 OF THE RULES OF THE COURT OF CLAIMS OF THE UNITED STATES (U. S. CT. CL. RULE 69, 28 U. S. C. A.)

(b) MISTAKES; INADVERTENCE; EXCUSABLE NEGLECT; NEWLY DISCOVERED EVIDENCE; FRAUD; ETC.; RESPONSE: On motion conforming to Rule 11 and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: . . . (6) any other reason justifying relief from the operation of the judgment. . . . A motion under this paragraph (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of the court to entertain an independent action to relieve a party from a judgment, order or proceeding, or to set aside a judgment for fraud upon the court. The relief provided by this rule shall be in addition to the relief available to the United States under Rule 68(a)(2). . . .

RULE 19 OF THE SUPREME COURT OF THE UNITED STATES REVISED RULES (U. S. SUP. CT. RULE 19, 28 U. S. C. A.)

1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted

only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered: . . .

> (b) Where a court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims, . . .

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 948

MARTIN VON CARSTANJEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

We respectfully invite the attention of the Court to the following facts which show that the petition was filed out of time: The judgment of the Court of Claims, dismissing this action for failure to prosecute, was entered on December 3, 1956. Petitioner's timely motion to vacate the judgment, filed on December 27, 1956, was denied by the Court of Claims on January 16, 1957. Almost seven years later, on November 26, 1963, petitioner filed a motion for new trial seeking to invoke Rule 54 (now Rule 69(b)) of the Court of Claims; that motion was denied on January 24, 1964.

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Petitioner's latest motion for rehearing, filed on June 27, 1968, and denied by that court on October 18, 1968, is his *thirteenth* motion seeking to revive the suit dismissed in 1956. (Previous motions were filed by petitioner on February 3, 1964; April 13, 1964; May 18, 1964; June 16, 1964, July 14, 1964; December 27, 1964; April 29, 1965; May 17, 1965; January 28, 1966; and April 26, 1968, and were variously denied by the Court of Claims on February 14, 1964; May 15, 1964; June 12, 1964; October 16, 1964; February 19, 1965; June 11, 1965; March 18, 1966; and June 5, 1968.)

Under Rule 68(c) of the Rules of the Court of Claims, a motion for rehearing must be filed within 30 days of entry of judgment. A motion under Rule 69(b) for relief from judgment on account of mistake, newly discovered evidence, and the like must be filed within one year. With the exception of petitioner's December 27, 1956, motion for rehearing, denied on January 16, 1957, all of his motions have been substantially out of time under the Rules of the court below. Since none of these untimely motions was actually entertained on the merits by the Court of Claims, they did not renew the time fixed by 28 U.S.C. 2101(c) for petitioning this Court to review the judgment dismissing petitioner's action. See *Federal Trade Commission* v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206.

The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

FEBRUARY 1969.

U.S. GOVERNMENT PRINTING OFFICE: 1969